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Hi-Voltage Wire-Works, Inc. *v.* City of San Jose

*by Marjorie E. Cox, Esq.**

In a decision issued on November 30, 2000, the California Supreme Court unanimously ruled that the outreach and participation elements of the City of San Jose's public contracting program violate article I, section 31 of the California Constitution.[1] Adopted by state voters in 1996, pursuant to Proposition 209, in pertinent part this section prohibits state and local governments from "discriminat[ing] against or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

The decision—the Court's first on the scope of article I, section 31—includes a total of four opinions: the majority or lead opinion, authored by Justice Brown and joined by Justices Mosk, Baxter, and Chin; a concurring opinion by Justice Mosk; a brief opinion by Justice Kennard concurring in the judgment; and a separate concurring and dissenting opinion by Chief Justice George in which Justice Werdegar joined. The purpose of this article to provide a brief synopsis of the analytical route traveled by the court in reaching its holding.

1. Factual Background

Following the passage of Proposition 209, and as part of its continuing effort to eliminate a documented, statistically significant disparity in the dollar value of public works contracts and subcontracts awarded to minority business enterprises (MBE's) and women business enterprises (WBE's), the City of San Jose replaced its existing public contracting affirmative action program with the "Nondiscrimination/Nonpreferential Treatment Program" (Program) at issue in this case. In addition to obligating the City itself to engage in a wide array of general outreach efforts, the Program imposed a number of requirements on prime contractors wishing to submit bids on public works construction contracts having an estimated cost in excess of $50,000.

More specifically, for their bids to be determined responsive, prime contractors were required to submit a signed statement attesting that in listing subcontractors in their bids, they had not given any preference to, nor discriminated against, any firm based on race, sex, color, age, religion, sexual orientation, disability, ethnicity or national origin, and acknowledging that any such discrimination or preference would violate a city ordinance. In addition, prime contractors were required to demonstrate that they had not excluded MBE/WBE subcontractors from the bid process by one of two means.

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The first of these (the Documentation of Outreach option, as titled by the City) required that prime contractors document that they (1) sent written notices to not less than four MBE/WBE subcontractors in each appropriate trade, area of work, or supply, indicating the prime contractor's interest in bidding on the project; (2) subsequently contacted, or made at least three attempts to contact, each of these subcontractors to determine their interest in bidding for work on the project; and (3) negotiated in good faith with, and did not unjustifiably reject, any bid prepared by these subcontractors.

The second means (the Documentation of Participation option) required prime contractors to document that the subcontractors listed in their bid included the number of MBE/WBE subcontractors that would be expected in the absence of discrimination, as determined by the City for each project.

Only the latter two components of the City's Program were challenged in the instant case. This challenge arose out of a bid solicitation issued by the City in 1997. Plaintiff, Hi-Voltage Wire Works, Inc. (Hi-Voltage) was the low bidder on the project. Because it intended to use no subcontractors on the project, Hi-Voltage did not comply with either the Documentation of Outreach or Documentation of Participation components of the City's Program. When, as a result, the City rejected its bid, Hi-Voltage sued, claiming that these components of the Program violate Article I, section 31 (hereafter referred to as "section 31").

2. The Majority Opinion

While Justice Brown's majority opinion is somewhat lengthy, it is in major portion devoted to a review of prior cases which not only reads like an anti-affirmative action polemic but is also more or less openly disavowed by Chief Justice George and Justices Mosk and Kennard in their separate opinions. In concluding that the Documentation of Outreach and Documentation of Participation components of the City's Program violate section 31's injunction against the granting of preferential treatment, the majority traveled the following analytical route:

- A constitutional amendment should ordinarily be construed in accordance with the natural and ordinary meaning of its words.[2]
- Nothing in the ballot materials accompanying Proposition 209 suggests that a different rule should apply with respect to the term "preferential treatment" as used in section 31.[3]
- In common understanding, "'preferential' means giving 'preference,' which is 'a giving of priority or advantage to one person . . . over others'."[4]
- The outreach component of the City's Program entails the giving of a preference because it "requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's. The fact prime contractors are not precluded from contacting non-MBE's/WBE's is irrelevant. The relevant constitutional consideration is that they are compelled to contact MBE's/WBE's, which are thus accorded preferential treatment within the meaning of section 31."[5]
- "The participation component authorizes or encourages what amount to discriminatory quotas or set-asides, or at least race-and sex-conscious numerical goals" and thus "effectively provides an advantage to members of the targeted groups" and at the same time discriminates against others because it encourages contractors to use MBE's and WBE's in the percentage specified.[6]

While those interested in logic and the art of disputation will find much to critique in the majority, including several rather astonishing non-sequiturs, there seems little point in traveling that path here. For present purposes, the only additional points that appear worthy of note are that the majority does at least "acknowledge that outreach may assume many forms, not all of which would be unlawful" under section 31 and cites the generally applicable outreach program reviewed in Domar Electric, Inc. v. City of Los Angeles, 9 Cal.4th 161 (1994) with apparent favor, although it avows that it expresses "no opinion regarding the permissible parameters of such efforts."[7]

3. Justice Mosk's Concurrence

Though Justice Mosk declares in his concurrence that he writes separately "because, on one point," he wishes "to say somewhat more," over half of his opinion is devoted to explaining a second point, that is, why he agrees "with the court in the substance of its analysis."[8] In addition to providing a more

eloquent statement of the rationale underlying the majority's holding,[9] this portion of the opinion serves the following important functions.

First, it sounds a warning that section 31 neither demands nor tolerates government passivity in the face of evidence of past or present discrimination by private parties in the operation of public contracting, public employment, or public education. To the contrary, section 31 bars government "from enabling, facilitating, encouraging, or requiring private parties" to discriminate or grant preferential treatment on a prohibited basis.[10] Thus, in Mosk's view, it "is altogether legitimate and even necessary" for government to seek "to remedy the effects of past discrimination and preferential treatment, and to prevent present or future discrimination or preferential treatment," in the operation of the listed enterprises.[11] Second, this portion of the opinion underscores that the means chosen by government to achieve such lawful goals must themselves pass muster under section 31.[12]

Finally, in the second half of his opinion, Justice Mosk attempts to give some guidance to the City and to other governmental actors as to the nature of the measures they might lawfully employ as a means to achieve the foregoing legitimate goals. Suffice it to say that the

opinion suggests that the Documentation of Outreach component of the City's program would have been fine if, instead of requiring prime contractors to make the overtures specified to MBE/WBE's, this component had required them to extend such efforts to some number of contracting firms of their own choosing.[13]

4. Justice Kennard's Concurrence

Justice Kennard's concurrence functions solely to provide her with a forum for announcing that she concurs only in the court's judgment and for repudiating the majority's anti-affirmative action polemic and certain aspects of the other opinions as unnecessary to the decision.

5. Concurring and Dissenting Opinion of Chief Justice George

This opinion appears likely to have been circulated at some point as a possible majority opinion. This may explain the opinion's unusually sharp and extended criticism of the majority's anti-affirmative action polemic, which the Chief Justice characterizes as "not only unnecessary to the resolution of the issue" before the court but also as "likely to be viewed as less than evenhanded."[14] The Chief Justice's analysis of the challenged components of the City's Program, however, proceeds along the same main track as that followed by the majority in substance and, like the majority, the Chief Justice in the end concludes that the Program's Documentation of Outreach and Documentation of Participation components violate section 31.[15]

In conclusion, Hi-Voltage sounds the death knell for government's use of outreach programs expressly targeted and limited to women and minorities, except in those circumstances identified in section 31 itself.[16]

Endnotes

1 Hi-Voltage Wire-Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000).
2 Id. at 559.
3 Id.
4 Id. at 560.
5 Id. at 562.
6 Id. at 562-563.
7 Id. at 565.
8 Id. at 570.
9 Id. at 570-575.
10 Id. at 570.
11 Id. at 572.
12 Id.
13 Id. at 574-575.
14 Id. at 576-581.
15 Id. at 576.
16 Section 31(e) essentially serves to save such actions if they "must be taken to establish or maintain eligibility for and federal program, where ineligibility would result in a loss of federal funds to the state." (See also section 31(h) [providing that section 31 "shall be implemented to the maximum extent that federal law and the United States Constitution permit"].)

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California Public Records Act and the Freedom of Information Act

By: Janel R. Ablon, Esq.*

Cities and other public entities often find themselves caught in a tug-of-war when faced with a request for an internal investigation report compiled during an investigation of workplace misconduct.[1] This struggle pits a city's disclosure obligations to the complainant, the accused and third parties under the California Public Records Act and the Fair Credit Reporting Act against the privacy rights of the individuals involved in the investigation as well as the potential chilling effect on the investigative process. This article recommends that the investigation report – including the witness statements – should generally be protected from disclosure. While a city may disclose the Investigatory File for strategic reasons or based on the individual facts and circumstances, there are legal risks involved in such disclosure.

General Legal Background

A. California Public Records Act and Federal Freedom of Information Act

Under the California Public Records Act (CPRA)[2], and the federal Freedom of Information Act (FOIA)[3], public entities such as cities are required to disclose public records when production is properly requested.[4] The CPRA defines a "public record" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency, such as a city, regardless of its physical form.[5]

The CPRA contains elaborate language promoting and safeguarding the accountability of government to the public. While the CPRA contains a clear general policy in favor of disclosure, it also explains that the rights of society cannot infringe on the rights of individuals. The CPRA expressly recognizes that disclosure of public records is not absolute. Disclosure of public records involves two fundamental yet competing interests – prevention of secrecy in government and the protection of individual privacy.[6] Consequently, the CPRA also limits the public's right of access to public records in certain circumstances.

1. The Exemptions To Disclosure Requirement

The CPRA includes two significant exceptions to the general policy favoring the disclosure of public records – materials expressly exempt from disclosure pursuant to Government Code § 6254[7] and the "catch-all exception" of § 6255. Under § 6255, a government agency may withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. The catchall exception does not apply, however, where the records sought are within the category of the type of documents exempted from mandatory disclosure under § 6254(e).[8]

Under §6254, subsection (c) pertaining to personnel records, and subsection (f) pertaining to investigatory or security files, arguably a city may refuse to disclose documents related to an investigation of workplace misconduct. The FOIA, which was the model for the CPRA, has comparable exemptions.[9]

a. The Personnel Exemption, § 6254(c)

California Government Code § 6254(c) and 5 U.S.C. § 552(b)(6) exempt personnel, medical, or similar records from public inspection where disclosure would constitute an unwarranted invasion of personal privacy ("Personnel Exemption"). The FOIA narrows this exemption to require that disclosure constitute a "clearly" unwarranted invasion of privacy.

Under the Personnel Exemption, the threshold question is whether the requested investigation report constitutes personnel files or similar files. In Washington Post v. United Stated Department of States,[10] the United States Supreme Court clarified that Congress did not intend to limit this exemption to a "narrow class of files containing only a discrete kind of personal information. Rather the exemption was intended to cover detailed government records on an individual which can be identified as applying to that individual." The Court explained that files are similar to personnel records for purposes of FOIA if they contain "reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken or has been taken."[11] Therefore, an investigation report, the witness statements, and the notice of disciplinary action against the accused employee, if discipline is imposed, would be covered under the Personnel Exemption.

The second determination to be made under the Personnel Exemption is whether disclosure of the investigation report would constitute an unwarranted invasion of personal privacy. In Dobronski v. Federal Communications Commission,[12] the Ninth Circuit stated that FBI agents, like all public employees, have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment. Under the FOIA, to determine whether an invasion of privacy is "clearly" unwarranted, a federal court will balance the following factors: (1) the requester's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of an alternative means of obtaining the requested information. Since the equivalent exemption in the CPRA is broader, a less stringent balancing test would likely apply.

b. The Investigatory Exemption, § 6254(f)

Section 6254(f), which permits a city to withhold "investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purpose," is the other possible applicable exemption. In California, however, this provision has been interpreted to apply only where there is a concrete and definite prospect of criminal law enforcement.[13] In contrast, under the FOIA's comparable exemption, records of an internal investigation are compiled for a law enforcement purpose if they focus specifically on alleged acts that could result in civil or criminal sanctions, if those acts were proven.[14] The FOIA, however, is not the governing authority where a California court has already precluded application of the exemption to civil scenarios. Therefore, this exemption may only apply if the investigation delves into possible criminal activity.

B. Potential Liability for Unlawful Disclosure

The exemptions in the CPRA and the FOIA are not mandatory, but are rather permissive.[15] Although a city may be entitled to withhold access to certain public records under the Personnel Exemption or the Investigatory Exemption, a city is not required to do so where some "dominating public interest favors disclosure."[16] Thus, a city must determine whether it will rely on the exemptions discussed above to preclude disclosure or whether it will permit inspection. A city must still consider, however, the risk of treading on the privacy rights of the complainant, the accused, and other witnesses should it choose to permit public inspection.

1. Civil Liability and Constitutional Violation

Although there is no case directly on point, disclosure of certain personal information contained in the investigation report, the witnesses statements, and particularly the notice of disciplinary action to the accused, may compromise the privacy rights of the individuals involved, thereby posing a risk of civil liability for the public entity.[17]

In addition to a civil action based on common law claims, the complainant, the accused or a witness may argue that disclosure of the Investigatory File violates his or her constitutional right to privacy. In fact, the California Constitution contains an express privacy right.[18] However, state action is required to trigger the protections of the due process provisions of the Fourteenth Amendment to the United States Constitution and article 1, § 7(a) of the California Constitution.[19]

C. The Fair Credit Reporting Act

A city is obligated to provide the accused with certain information about the investigation under the Fair Credit Reporting Act (FCRA)[20] when the investigation is conducted by an outside agency like a law firm or an investigator, [21] and adverse action is taken against the accused.

The FCRA, which applies to reports prepared by third-party agencies on employees and job applicants, was amended by the Consumer Credit Reporting Reform Act of 1996 and the Consumer Reporting Employment Clarification Act of 1998. These recent amendments impose new notice, consent, disclosure and authorization requirements. For our purposes, the new disclosure requirements are relevant to a city's disclosure obligations with respect to the accused.

According to the Federal Trade Commission (FTC), which implements the FCRA, an outside agency, such as a private investigator or law firm, that regularly conducts investigations of alleged workplace misconduct by employees[22] is very likely a "a consumer reporting agency" under the Act.[23] The outside agency's ensuing report and related documents are likely considered "consumer reports."[24]

On March 31, 2000, the FTC issued an opinion letter, stating that the accused is entitled to the following documents – whether or not the accused specifically requests any portion of the Investigatory File – when a consumer reporting agency conducts an investigation resulting in adverse action[25] against the employee: (1) name and other identifying information about the outside agency performing the investigation; and (2) notice of the accused's rights to obtain a summary of the nature and substance of the report and to dispute the accuracy of the information in the report.[26] These actions are only required after the employer takes adverse action.[27] Accordingly, if the city conducts the investigation, or if adverse action is not taken against the accused, a city is not obligated to provide the accused with any information about the investigation under the FRCA.

Disclosure Obligations

A. Disclosure Obligations to the Complainant

A complainant may request disclosure of the Investigatory File in his or her capacity as an employee, or as a formal request under the CPRA.

1. Formal Request Under the CPRA

Under the CPRA, we must first determine whether disclosure is mandated. So long as they constitute "public records," documents are subject to inspection.[28] Documents related to workplace investigations appear to constitute public records as information "relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[29] Therefore, we must determine whether the documents can be withheld from disclosure under one of the two applicable exemptions set forth in the CPRA and discussed above in Part I (A)(1).

While the documents related to a workplace investigation constitute a public record, they also constitute "personnel" records and are potentially exempted from disclosure under the Personnel Exemption discussed above. In analyzing a complainant's CPRA request under the Personnel Exemption, the privacy rights of the accused and witnesses are at issue. The complainant will likely know the identity of the accused and the witnesses and may well know what they have generally divulged to the investigator. While the accused or the witnesses may view the simple action of disclosure to the complainant as actionable, the real problem is that the complainant may further disclose the information in the investigation report and witnesses statements to unrelated third parties or the media. This may incur liability for claims by the accused and witnesses, and will have a chilling effect on the willingness of witnesses to come forward with information in the future.

This is especially problematic when the investigation contains ancillary information. For example, the report may discuss the accused's or a witnesses' prior misconduct. Unfortunately, it is difficult to insure that the complainant will not share the Investigatory File with other individuals. While a city may adopt a policy prohibiting further disclosure by the complainant, such a policy may not be

enforceable. Since the complainant is acting as a member of the public, rather than within the scope of employment when making a public records request, such a policy may be unenforceable against the complainant under the circumstances. The argument for not disclosing witness statements is even greater because the balance tips so heavily in favor of the individual witnesses' privacy rights, and the desire to encourage witnesses to come forward and maintain documentation.

Accordingly, we conclude that no part of the Investigatory File – the investigation report, witness statements, or notice of action taken against the accused – should be disclosed to the complainant. The interest in providing timely information to the complainant is adequately served by providing the complainant with a summary of the investigation and findings.

2. Workplace Request as Employee

The issue may appear problematic if the complainant seeks the Investigatory File as an affected employee. The issue may be avoided if at the conclusion of the investigation interview the complainant is informed that he or she will be advised of the outcome. If it is determined that corrective action will be taken, the employee should discretely communicate the corrective action to the complainant.

In matters involving unlawful discrimination or unlawful harassment, irrespective of whether the complainant makes a specific request, a city should, at a minimum, inform the complainant of the results of the investigation. Specifically, this includes informing the complainant of the investigator's findings, i.e., whether the city determined that discrimination occurred, and whether discipline was imposed against the accused. A city may simply choose to inform the complainant that appropriate disciplinary action has or will be taken. However, a city is not obligated to inform the complainant of the specific level of disciplined imposed. In fact, this information may infringe upon the accused's privacy rights.

B. Disclosure Obligations to the Accused Employee

The accused, like the complainant, may request disclosure as an employee, or lodge a formal request under the CPRA. We discuss a city's disclosure obligations under each scenario.

1. Formal Request under the CPRA

Like a complainant's public records request, the accused's request falls within the CPRA's Personnel Exemption. In analyzing the accused's request under the exemption, the privacy of the complainant and the witnesses are implicated. Again, we conclude that these privacy rights and a city's potential for liability outweigh the accused's interest in viewing the Investigatory File. Similar to the complainant, the accused may disclose the information contained in the report and witnesses statements to third parties. This is especially problematic when the investigation report discusses the complainant's or witnesses' prior employment or disciplinary history. Moreover, disclosure will have a chilling effect on future complaints – complainants will be less likely to lodge future complainants, and witnesses will be more reluctant to step forward with relevant information.

Subsequently, we recommend that no part of the Investigatory File, except the notice of disciplinary action, be disclosed to the accused. The interest in providing timely information to the accused is adequately served by providing a summary of the investigation and findings.

2. Workplace Request as Employee

A city generally has the same responsibility of disclosure to the complainant and the accused. If the accused requests the Investigatory File, independent from a formal public records request, a city should provide the accused with a summary of the investigation and the findings. A city is not obligated, however, to disclose the actual contents of the Investigatory File. In addition, the accused must receive a notice of disciplinary action, assuming discipline is imposed, which should contain certain details supporting the discipline imposed. This recommendation is consistent with the requirements of the FCRA, discussed above in Part I (C), when an outside agency conducts the investigation and adverse action is taken.[30]

C. Disclosure Obligations to Third Parties

In order to obtain the Investigatory File, a third party must make a formal request under the CPRA. However, under the Personnel Exemption analysis discussed above, the public interest in protecting the privacy of the complainant, the accused, and the witnesses, and in preventing a chilling effect on future complaints, clearly outweighs the public interest in disclosure of the investigation report and other related documents to third parties.

In City of San Jose v. Superior Court of Santa Clara County[31], a daily newspaper sent a written request to the San Jose International Airport for disclosure of public records in accordance with the CPRA. In particular, the newspaper sought access to the names, addresses, and telephone numbers of 215 individuals who had made complaints about the airport noise. The City of San Jose court emphasized the likelihood that public disclosure of airport complainants' names, addresses, and telephone numbers would have a chilling effect on future complaints. Furthermore, the court stated that public disclosure would subject the complainants to the loss of confidentiality in their complaints, and also to direct contact by the media and by persons who wish to discourage complaints.

Like the airport complainants in City of San Jose, a city complainant, as well as the public, have a strong interest in confidentiality of complaints of wrongdoing. To threaten this anonymity risks hampering future complainants from stepping forward. Consequently, complainants will seek other remedies, and workplace misconduct will never be curtailed. In order to avoid this chilling effect, complainants must feel free to voice their concern without fear of disclosure. Public disclosure would also subject the complainant to direct contact by the media and persons who wish to discourage such complaints.

Similarly, the accused's privacy rights also outweigh the public interest in disclosure. For example, in Hunt v. Federal Bureau of Investigation,[32] a criminal defendant filed a request under the FOIA, seeking disclosure of a file containing the findings of an internal FBI investigation into the conduct of a particular female FBI agent. The investigation of the agent had been triggered by the defendant's complaint that the female FBI agent in question, who had been assigned to the defendant's case while he was cooperating as a government witness, induced the defendant to waive his right to counsel and accept an unwise plea bargain. The Hunt court determined that the highly personal nature of the information contained in the investigation report necessitated exemption from disclosure under the FOIA. Disclosure would likely cause the accused FBI agent personal and professional embarrassment and

she would permanently be associated with allegations of sexual and professional misconduct.

In Hunt, the court also determined that redaction of the accused's name, leaving the description of the investigation in the file, would not sufficiently protect the accused because the disclosure was focused on one isolated investigation. Similarly, if a city redacts the accused's name, his or her privacy interests would not be protected since the third party's public records request would focus on one particular investigation, and subsequently the parties would be known.

Where the allegations against the accused employee are determined to be false, the accused's privacy rights are heightened, tilting the scale heavily in favor of nondisclosure. In City of Hemet v. the Superior Court of Riverside County[33], a police sergeant became concerned with drug use at the high school his children attended. He collected certain information, and eventually faxed to school officials a list of students he believed to be involved in the use or sale of drugs. The faxed memorandum also reported that a deputy sheriff was aware of the drug use, but did not prevent or disclose it. The sergeant's action became the subject of public interest when the memorandum was circulated to others beside school officials. The City of Hemet eventually conducted an investigation into the incident focusing on whether the sergeant had improperly used city resources. Following the investigation, the press sought the police department's investigation report pursuant to the CPRA.

The Hemet court recognized the "legitimate privacy interests militated against disclosure of baseless charges and investigations which uncovered no wrongdoing."[34] In Hemet, however, the allegations against the sergeant were, in fact, sustained. Subsequently, in this instance, the court advocated broad disclosure rights, especially since the accused was a law enforcement officer, one of the most powerful positions in society. Applying Hemet, if a city finds the complainant's allegations to be meritless, and a city imposes no disciplinary action against the accused, nondisclosure is essential to securing the privacy rights of the accused.

Aside from the privacy rights of the accused and the complainant, the witnesses who participated in the investigation also have privacy rights that likely outweigh the public interest in disclosure. Furthermore, if a city produces the Investigatory File for public inspection, witnesses will be less likely to come forward and disclose what they know. For the foregoing reasons, we conclude that neither the investigation report nor the witness statements should be disclosed to third parties.

CONCLUSION

Before complying with a public records request for documents relating to an internal investigation of workplace misconduct, public entities must seriously weigh various factors – none more significant than the privacy rights of the individuals involved. Generally, this balance should tip the scale in favor of nondisclosure. But, as with any general rule, there are exceptions. The city or other public entity must consider the contents of the particular request and by whom it is made, and then make a decision based on those unique circumstances.

ENDNOTES

* Janel R. Ablon is an associate with Littler Mendelson in Los Angeles. Ms. Ablon appreciates the contributions of Hilda Cantu Montoy, City Attorney of Fresno, in preparing this article.

1 For purposes of this article, all documents related to the investigation report are referred to collectively as the "Investigatory File."

2 California Government Code § 6250 et seq.

3 5 U.S.C. § 552.

4 The CPRA was modeled after the FOIA. Therefore, California courts frequently look to the federal Act for guidance, and we consider the FOIA as a guide to the analysis in this article. ACLU v. Deukmejian, 32 Cal. 3d 440, 186 Cal. Rptr. 235 (1982). However, where the courts have interpreted a provision of the CPRA, the comparable FOIA provision is no longer instructive. Id.

5 Cal. Gov. Code § 6252.

6 Black Panther Party v. John Kehoe, 42 Cal. App. 3d 645, 651, 117 Cal. Rptr. 106, 110 (1974).

7 All future citations are to the California Government Code, unless otherwise noted.

8 City of Hemet v. the Superior Court of Riverside County, 37 Cal. App. 4th 1411, 44 Cal. Rptr. 2d 532 (1995).

9 See 5 U.S.C. §§ 552(b)(6) and (7).

10 456 U.S. 595 (1982).

11 Department of the Air Force v. Rose, 425 U.S. 352, 377 (1976).

12 17 F.3d 275 (9th Cir. 1994).

13 State of California ex rel. Division of Industrial Safety v. The Superior Court of Los Angeles, 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (1974).

14 Cappabianca v. Commissioner, United States Customs Service, 847 F. Supp. 1558 (1994).

15 Black Panther Party, 42 Cal. App. 3d at 656.

16 Id.

17 See Michael v. Gates, 38 Cal. App. 4th 737, 45 Cal. Rptr. 2d 163 (1995) (holding that disclosure of a police officer's personnel file did not constitute an invasion of privacy because the disclosure was not sufficiently serious in nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right). Michael implicated the privacy rights of a police officer. It is important to realize that police officers generally enjoy greater rights than other individuals. See also Welsh v. City & County of San Francisco, 887 F. Supp. 1293 (1995) (finding in favor of disclosure of the tapes and transcripts based on the court's determination that disclosure by future witnesses in Police Commission investigation would not be chilled).

18 Cal. Const., Art. 1, § 1.

19 NCAA v. Tarkanian, 488 U.S. 179, 191 (1988).

20 15 U.S.C. § 1681 et seq.

21 While no court has examined this provision, the California Business and Professions Code § 7521 states that only licensed private investigations may conduct investigations unless the investigation is performed by attorneys or by the employer's personnel.

22 There is no clear definition for the phrase "regularly conducts investigations of alleged workplace misconduct by employees." However, a few courts outside of California have offered some guidance. In Hodge v. Texaco, 975 F.2d 1093 (5th Cir. 1992) and Friend v. Ancillia Systems, Inc., 68 F. Supp. 2d 969 (N.D. Ill. 1999), the courts found that the alleged "consumer reporting agency" was not, in fact, a consumer reporting agency because it had only prepared an investigation report once. These decisions suggest that in order for an agency to be considered "a consumer reporting agency," it must have

conducted, at a minimum, more than one investigation.

23 A "consumer reporting agency" is defined by the FCRA to include any person who, for monetary fees, "assembles or evaluates" credit information or other information on consumers for the purpose of regularly furnishing consumer reports to third parties using any means or facility of interstate commerce. 15 U.S.C. § 1681a(f).

24 "Consumer reports" consist of "any written, oral, or other communication[s] of any information by a consumer reporting agency bearing on [an applicant's or employee's] credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected for . . . employment purposes." 15 U.S.C. § 1681a(d).

25 "Adverse Action" is defined by the Act to include "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee .. .." 15 U.S.C. § 1681(k)(1)(B)(ii).

26 Letter from Robert Pitofsky, Chairman of the FTC, to Pete Sessions, House of Representative (Mar. 31, 2000).

27 Id.

28 Cal. Gov't Code § 6253(a).

29 Cal. Gov't Code § 6252(e).

30 Disclosure obligations to employees covered by a collective bargaining agreement are not addressed in this article.

31 74 Cal. App. 4th 1008, 88 Cal. Rptr. 2d 552 (1999).

32 972 F.2d 286 (9th Cir. 1992).

33 37 Cal. App. 4th 1411, 1428, 44 Cal. Rptr. 2d 532, 543 (1995).

34 Id. at 1428.

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The Eleventh Amendment and State Sovereign Immunity From Suit Under Federal Law

by Martin H. Dodd, Esq.[1]

Public entities in California are doubtless generally familiar with the immunities from suit afforded by state law, but may be less familiar with the immunities available to public entities and public officers under federal law. Such immunities fall into three general categories: (1) the so-called "Eleventh Amendment" immunity available to States, their officers and instrumentalities; (2) absolute immunities applicable to certain public officials; and (3) qualified immunities applicable to certain conduct of public officials. This first part of a two-part article discusses the Eleventh Amendment to the U.S. Constitution and the scope of state sovereign immunity in federal court. Absolute and qualified immunities will be addressed in a subsequent article.

The "Eleventh Amendment" Immunity

The Eleventh Amendment to the U.S. Constitution provides:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State."

Ratified in 1795, the Eleventh Amendment came in the wake of an early, and controversial, U.S. Supreme Court decision, Chisolm v. Georgia, 2 Dall. 419 (1793). The Chisolm Court held that there was no impediment under the new federal constitution to a state law action for money damages brought in federal court against the State of Georgia by a citizen of another state. The Eleventh Amendment, by its terms, specifically precluded such actions in future.

The question left unanswered by Chisolm and the Eleventh Amendment, however, was whether a private citizen could bring suit against a state in state or federal court alleging violations of federal law.[2] On its face, the Eleventh Amendment does not address such cases. But the Supreme Court has said that it has understood the "'Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" [3] That presupposition is that (1) "'each State is a sovereign entity in our federal system'" and (2) "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"[4] As articulated by the Court, state sovereign immunity is a "background principle" against which the Constitution was framed.[5] In other words, the Eleventh Amendment does not define the scope of state sovereign immunity; rather it merely clarifies one aspect of a preexisting immunity enjoyed by the sovereign states that was incorporated into the federal structure of the Constitution.[6] Phrased succinctly, with limited exceptions discussed below, states are not subject to federal jurisdiction in damage actions by individuals unless the states have consented to such suits.[7]

While Congress may abrogate the states' sovereign immunity if "Congress unequivocally expressed its intent to abrogate the immunity; and, [if, in doing so] Congress acted pursuant to a valid grant of constitutional authority,"[8] in a spate of recent decisions the Court has held that Congress lacks the constitutional authority to abrogate state sovereign immunity under its Article I powers over interstate commerce, patents and the like. In these decisions, the Court has concluded that states are immune from suit by private parties under a host of federal laws, including the Indian Gaming Regulatory Act ("IGRA"), the Lanham Act, the Fair Labor Standards Act, and the Age Discrimination in Employment Act ("ADEA").[9] The Court's decisions in these cases imply that states may enjoy immunity in the face of lawsuits brought under other federal statutes as well, such as the antitrust laws or the bankruptcy statutes.[10] As the Court stated:

> "Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[11]

Who And What Is A "State" For Purposes Of The Eleventh Amendment?

State sovereign immunity applies only to the states, their officers and instrumentalities. It does not apply to government entities, such as municipal corporations, that are not arms of the state.[12] Whether a particular governmental body is an instrumentality of the state is determined by reference to state law.[13] The entity asserting the immunity bears the burden of proving the defense.[14] The Ninth Circuit applies the following five-factor balancing test to determine if a body is an "arm of the state":

- whether a money judgment will be paid

from the state treasury;
- whether the entity performs a "central governmental function;"
- whether the entity may sue or be sued;
- whether the entity can take property in its own name; and,
- the entity's corporate status.[15]

No single factor is determinative.[16] Even apparently "local" bodies may be considered arms of the state. For example, under California law, state courts are considered instrumentalities of the state rather than of the counties in which they sit and, therefore, they may assert the immunity.[17] The courts enforce state law and judges are paid and the courts are largely funded by the state. Similarly, because "the state is so entangled with the operation of California's local school districts. . . individual districts are treated as 'state agencies' for purposes of the Eleventh Amendment."[18]

As with state instrumentalities, if an individual public officer sued in her official capacity is a state officer, the suit is in effect a suit against the state itself and (with one exception discussed below), the immunity applies.[19] But what of outwardly local officials who carry out statewide or state-mandated duties? The issue is significant because local governments may indirectly rely upon the Eleventh Amendment immunity if they have been sued for acts committed by an officer who, as it turns out, is considered a state official and thus able to assert the immunity. The Supreme Court has held that whether a local official is in fact acting as a state official is a question of state law, local practice and the function and duties of the position.[20] A sheriff, for example, may be a county official in one state; a state official in another.[21] Moreover, the determination with respect to a particular position may even vary from case to case within a state depending upon the functional area and conduct at issue.[22] In light of this federal precedent, the California Supreme Court, analyzing the California constitution and statutory law, has concluded that district attorneys, for example, are state officials, at least when prosecuting crimes or training employees concerning the prosecution of crimes.[23]

More troublesome for the courts has been the status of sheriffs. Article V, section 13 of the California constitution and California Government Code § 12560 provide that sheriffs act under the supervision of the state Attorney General. Other statutes likewise suggest that sheriffs are officials acting principally in the service of the state.[24] In a leading decision, the California court of appeal, relying on these provisions and the California Supreme Court's analysis concerning district attorneys, has concluded that when detaining arrestees in the county jails pursuant to outstanding warrants, sheriffs are state officials.[25]

Still other provisions of state law, however, support the notion that sheriffs are county officials.[26] Confronted with these apparently conflicting statutory and constitutional provisions, the federal district courts in particular have reached sharply conflicting results with respect to whether sheriffs are state or county officials. [27] The Ninth Circuit has recently stepped into the fray, and specifically declining to follow the California court of appeal decision discussed above, concluded that a sheriff acts as a county official when unlawfully detaining inmates beyond their release date in order to complete necessary warrant checks.[28]

Since it is apparent that the precise functions and alleged wrongdoing at issue will be of critical importance to the immunity question, practitioners faced with a lawsuit against a sheriff in his or her official capacity should carefully analyze the wrongdoing alleged and make the best immunity argument available in light of the extant case law. Furthermore, in light of the divergent holdings of the state and federal courts of appeal on this issue, the forum in which the case is pending may determine the outcome of an Eleventh Amendment challenge.

State Waiver of Eleventh Amendment Immunity

The first exception to sovereign immunity arises in those cases where a state has waived the immunity by consenting to suit.[29] States may waive the immunity on a case-by-case basis.[30] "The Eleventh Amendment . . . does not automatically destroy original jurisdiction [in the federal courts]. Rather, the Eleventh Amendment grants the state a legal power to assert a sovereign immunity defense should it choose to do so. The state can waive the defense. Nor need a court raise the defect on its own. Unless the state raises the matter, a court can ignore it."[31]

An unequivocal waiver of the immunity is necessary before a state will be subject to suit.[32] In one early case, for example, the Supreme Court held that a Utah statute that permitted taxpayers to bring suit in "any court of competent jurisdiction" to recover a state tax refund was insufficient to subject the state to such a suit in federal court.[33] While the statute clearly permitted suit against the state in its own courts, the statutory language could not be read to have impliedly waived the immunity for suits brought in federal court.

Nor may a state "constructively waive" its immunity to suit by engaging in conduct otherwise permissibly regulated by Congress.[34] An early case had suggested that by voluntarily participating in conduct (e.g., running a railroad) that was clearly subject to congressional regulation under the Commerce Clause, a state could be held to have waived its immunity.[35] That decision had been whittled down over the years, and in 1999 the Court specifically overruled it.[36] The Court noted that if Congress had no power under Article I of the Constitution to abrogate state sovereign immunity in the first instance, it ought not to be able to extract a waiver by conditioning participation in regulated activity upon such a waiver. "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin."[37]

Even where a state has expressly waived its immunity, questions may still be raised over how far the waiver extends. Although a state waives its immunity by invoking the jurisdiction of the federal courts, does that mean that the waiver applies to all claims that the other party may assert against the state by way of counterclaim? The federal courts have not reached consensus on the issue. In a recent case, for example, the Ninth Circuit held that by filing a proof of claim in a bankruptcy proceeding, a state waives its immunity "with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim."[38] The court reserved for another day a decision with respect to whether the waiver is limited only to compulsory claims or defenses (such as recoupment) necessary to defeat the state's claim, as some courts have held, or whether it extends even to claims permitting affirmative relief against the state, as other courts have held.[39] In short, the breadth of the waiver of state sovereign immunity remains an area of uncertainty and practitioners should consider carefully whether by pursuing a claim in federal court on behalf of a state, they may be inadvertently opening up the state to an even broader counterclaim for affirmative relief.

Congressional Abrogation Of State Sovereign Immunity Under The Fourteenth Amendment

Another limited exception to state sovereign immunity recognized by the courts is Congress' enforcement power under Section 5 of the Fourteenth Amendment.[40] The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution" and therefore "§ 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by [the Eleventh] Amendment."[41] Congress need not expressly invoke its authority under Section 5 for a court to conclude that Congress has properly exercised the power.[42] Since "[d]ifficult and intractable problems often require powerful remedies," the Supreme Court has "never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."[43] Conversely, Congress may not simply assert that an abrogation of sovereign immunity has been intended under Section 5. The Court has reserved for itself the role of determining whether an abrogation of state immunity is a valid exercise of Congress' enforcement power under Section 5. For "Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[44] Congress cannot "'decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.' . . . The ultimate interpretation of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."[45]

In determining whether Congress properly exercised its authority under Section 5, courts must look to legislative history to discern whether Congress was seeking to remedy pervasive deprivations of equal protection of the laws or deprivations of property without due process. Thus, in holding that Congress could not use its Section 5 powers to subject states to suit for patent infringement under the Lanham Act, the Court saw no evidence in the legislative history of a pattern of either state patent infringement or state patent infringement without the provision of procedural remedies. The Court assumed that patents were property that could be protected under the Constitution, but a "State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the state provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[46] Had the legislative history demonstrated evidence of such deprivations without due process, the Court could think of "no reason why Congress might not legislate against [it] under § 5 of the Fourteenth Amendment."[47] But, in light of the scant evidence of unconstitutional conduct in the legislative record, the remedial provisions of the Lanham Act as applied to the states were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood to as responsive to, or designed to prevent, unconstitutional behavior.'"[48] As a result, Section 5 of the Fourteenth Amendment did not authorize Congress to abrogate the states' immunity in patent infringement actions.

Perhaps more surprising than its decision regarding patent infringement suits against states is the Court's more recent holding that Section 5 of the Fourteenth Amendment does not authorize suits against states to remedy age discrimination under the ADEA.[49] The Court found that Congress had clearly intended to abrogate state sovereign immunity under the ADEA,[50] but nevertheless held that Congress lacked the authority to do so under Section 5. The Court stressed first that it had repeatedly held that age discrimination, unlike classifications based on race or sex, was not a "suspect classification under the Equal Protection Clause" of the Fourteenth Amendment.[51] As such, states could discriminate on the basis of age so long as a rational basis – the most lenient level of constitutional scrutiny – existed for doing so.[52] In light of those decisions, the Court concluded that the ADEA as applied to the states appeared out of proportion to the remedial purposes to be achieved.[53] The Court went on, though, to determine whether, notwithstanding its own jurisprudence regarding age discrimination, Congress was attempting to address a perceived serious problem of state age discrimination such that the ADEA was an appropriate remedy or whether instead, the ADEA was "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[54] As it had done when reviewing the Lanham Act, the Court analyzed the legislative history of the ADEA and found "'no evidence that [unconstitutional age discrimination] had become a problem of national import.'"[55] Therefore, "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment."[56] As such, the states retain their sovereign immunity in cases brought under that Act.

More recently still, in Board of Trustees of the University of Alabama v. Garrett,[57] the Court held that Section 5 does not authorize suits for money damages by state employees for violations of Title I of the Americans with Disabilities Act ("ADA"). Garrett is particularly remarkable because it sets a rather high threshold that Congress must overcome before it may utilize Section 5 to abrogate state sovereign immunity. Congress specifically invoked Section 5 in the ADA as a basis upon which it sought to abrogate sovereign immunity and had developed a body of evidence of discrimination against persons with disabilities in justifying passage. Nonetheless, the Court held that the legislative record was insufficient. The Court began by emphasizing that disability discrimination, like age discrimination, was not subject to strict constitutional scrutiny under the Fourteenth Amendment and could be justified using only the much more lenient rational basis analysis.[58] In the face of this more lenient constitutional scrutiny, the Court then looked to the legislative record to determine if Congress had nevertheless identified a "history and pattern of unconstitutional employment discrimination by the States against the disabled."[59] Although the record did contain evidence that even the Court majority acknowledged demonstrated State employment discrimination, the Court disparaged this evidence as "minimal" in light of the whole record and the number of people nationwide employed by the States. The Court compared the evidence in the record under the ADA unfavorably with the evidence supporting the Voting Rights Act of 1965, which showed an undisputed and extensive pattern of racial discrimination by the States. Moreover, the Court noted, the evidence in the record more clearly demonstrated discrimination in public services and public accommodations under

Titles II and III of the ADA, rather than under Title I.[60] And, in a significant limitation on the kind of evidence that can be relied upon to justify abrogation under Section 5, the Court declined to consider evidence of discrimination by local governments as part of the mix since local governments are not immune under the Eleventh Amendment.[61] According to the Court, therefore, the "legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[62] The "incidents" of such discrimination that were reflected in the record fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based."[63]

In a concurring opinion, Justice Kennedy emphasized that, in addition to a lack of evidence in the legislative record, he found no evidence in judicial proceedings around the country that employment discrimination by the States against the disabled was a common problem. "If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments," he wrote, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist."[64]

Finding an insufficient pattern of discrimination, the Court held that the remedy – suits for money damages against the states – was not "congruent and proportional to the targeted violation."[65]

The lesson for practioners in these cases is that even an expressed congressional intent to abrogate state immunity under Section 5 of the Fourteenth Amendment will be insufficient actually to justify abrogation. In litigating a claim that Section 5 provides the source of congressional power to abrogate state immunity, practitioners should carefully search the legislative history and the case law for evidence, or a lack of evidence, that Congress was attempting to remedy serious and pervasive equal protection or due process violations by the States. Absent such evidence, it appears that the States will be able successfully to assert the immunity.

Actions For Injunctive Relief Against State Officials

The Eleventh Amendment immunity is generally applicable only to damage actions against states and state officers acting in their official capacity. The immunity does not usually apply to actions against state officials for injunctive relief to "end a continuing violation of federal law."[66] The theory underlying such claims for injunctive relief is "that an unconstitutional statute is void, and therefore does not 'impart to [the official] any immunity from responsibility to the supreme authority of the United States.'"[67] The Supreme Court, while acknowledging the continuing vitality of injunctive relief actions against state officials, has nevertheless sounded cautionary notes in recent years about such cases.

Courts may not use the injunctive relief exception to state sovereign immunity to gut the immunity itself. Thus, if the scope of relief requested is so wide ranging as to implicate "state policies or procedures" such that the state is the real party in interest, the immunity will apply.[68] For example, while a suit against a state official seeking prospective relief against a state official may be permissible, an action seeking retroactive relief that would require payment of funds from the state treasury would be barred.[69] Similarly, an injunctive relief claim that would interfere with a state's ability to operate its property or watercourses within the state might be subject to the immunity.[70]

Moreover, if Congress has enacted a comprehensive remedial scheme designed to ensure enforcement of a statutorily-created right, it could be said that Congress intended not to permit actions for injunctive relief against state officers since that might be inconsistent with such remedial scheme.[71] In one case, for example, the Supreme Court found that Congress had no authority to subject states to suit under the IGRA. Because Congress had adopted a full remedial scheme, the Court held that an action for injunctive relief to compel the Governor of Florida to comply with the Act was inconsistent with Congress' intent in creating the remedial scheme. Although the Court concluded that the Eleventh Amendment barred damage actions against the states pursuant to that very same remedial scheme in the Act, the Court held that it was not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the statute] was beyond its authority. If that effort is to be made, it should be made by Congress, and not by the federal courts."[72] Accordingly, even the suit for injunctive relief was barred by the Eleventh Amendment.

Conclusion

The Supreme Court's renewed interest in the Eleventh Amendment and state sovereign immunity provides fruitful territory for attorneys representing public entities in California. In light of the scope of the immunity recognized by the Court in its recent jurisprudence, practitioners would be well advised to consider asserting the immunity in cases where, even a few years ago, it might never have been raised.

Endnotes

1 Mr. Dodd is a partner at DODD, FUTTERMAN & DUPREE, LLP in San Francisco and a member of the Executive Committee of the Public Law Section.

2 That this issue was left open is not particularly surprising since "federal question" jurisdiction was not extended by Congress to the federal courts until 1875. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 70 (1995).

3 Id. at 54.

4 Id.

5 Id. at 72.

6 Thus, it is something of a misnomer to talk of the "Eleventh Amendment immunity" since state sovereign immunity pre-dates the Constitution and the Eleventh Amendment addresses only one aspect of that immunity. Alden v. Maine, 527 U.S. 706, 713 (1999). The "federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status…. Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people. . . .'" Id. at 714. The historical and scholarly debate over the Eleventh

Amendment is beyond the scope of this article. Suffice it to say that the Court's understanding of the Eleventh Amendment, state sovereign immunity and the relative roles of the state and federal governments is not shared by – in fact, is vigorously disputed by – a four-member minority of the current Court. See, e.g., id. at 760 et seq. (Souter, J., dissenting).

7 Kimel v. Florida Board of Regents, 508 U.S. 62, 120 S.Ct. 631, 640 (2000).

8 Seminole Tribe, supra, 517 U.S. at 72 citing Green v. Mansour, 474 U.S. 64, 68 (1985).

9 See Seminole Tribe, supra, 517 U.S. 44; Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999); Alden v. Maine, supra, 527 U.S. 706; Kimel v. Florida Bd. of Regents, supra, 120 S.Ct. 631.

10 Seminole Tribe, supra, 517 U.S. at 73. See also id. at 76 n.1 (Stevens, J., dissenting). Some question remains whether the Bankruptcy Code was enacted solely under Article I or also pursuant to Congress' recognized power to abrogate state immunity under § 5 of the 14th Amendment. (See discussion infra). See Schulman v. State of California, __ F.3d__, 01 C.D.O.S. 383, 387 (9th Cir., Jan. 12, 2001) (noting the split among courts, but declining to decide the issue).

11 Seminole Tribe, supra, 517 U.S. at 72-73 (footnote omitted).

12 Alden, supra, 527 U.S. at 756; Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Brewster v. County of Shasta, 112 F.Supp.2d 1185, 1187 (E.D.Cal. 2000).

13 Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1035 (9th Circ. 1999).

14 Schulman, supra, 01 C.D.O.S. at 385.

15 Id.. at 388.

16 For example, in Schulman, supra, the Ninth Circuit placed greatest reliance on the second factor in finding that the California Underground Storage Tank Cleanup Fund was an arm of the state. 01 C.D.O.S. at 388-389. In a companion decision, Streit v. County of Los Angeles, 01 C.D.O.S. 390, 394-395 (9th Cir., Jan. 12, 2001, the court relied on several factors – but noted that the first factor is often considered the most important – in concluding that the Los Angeles County Sheriff's Department was not an arm of the state when administering the county jail. 01 C.D.O.S. at 396.

17 Franchesci v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995); Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1110 (9th Cir. 1987); County of Sonoma v. Workers' Comp. Appeals Bd., 222 Cal.App.3d 1133 (1990).

18 The Association of Mexican-American Educators v. State of California, 231 F.3d 572, 582 (9th Cir. 2000); Freeman v. Oakland Unified Sch. Dist., 179 F.3d 846, 846 (9th Cir. 1999).

19 Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 71 (1989); McMillian v. Monroe County, 520 U.S. 781 (1997).

20 McMillian, supra, 520 U.S. at 787, 789-790.

21 Id. at 795.

22 Id. at 785.

23 Pitts v. County of Kern, 17 Cal.4th 340, 353 (1998).

24 E.g., Cal. Gov't Code § 26600 (imposing on sheriffs the duty to enforce state criminal law) and Cal. Gov't Code § 25303 (county supervisors may not interfere with the investigative and prosecutorial functions of sheriffs).

25 County of Los Angeles v. Superior Court (Peters), 68 Cal.App.4th 1166, 1174 (1998).

26 E.g., Cal. Gov't Code § 24205 (sheriffs elected by county); Cal. Gov't Code § 26603 (sheriffs required to attend upon only courts within county); Cal. Gov't Code §§ 24000, 25300 (sheriff salaries established by county board of supervisors).

27 Compare Leon v. County of San Diego, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (sheriff acting as county official when making policy with respect to treatment of jail inmates needing medical attention); Brewster v. County of Shasta, 112 F.Supp.2d 1185 (E.D. Cal. 2000) (sheriff acting as county official when investigating crimes, but certified case for interlocutory appeal in light of conflicting rulings); Roe v. County of Lake, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (sheriff acting as county official when making policy regarding treatment of crime victims); Von Colln v. County of Ventura, 189 F.R.D. 583 (C.D. Cal. 1999) (sheriff acting as county official when using restraining chair in operation of jails); Granville v. Plummer, 1999 U.S. Dist. LEXIS 1395 (N.D. Cal., Feb. 8, 1999) (sheriff acting as county official when taking care of federal prisoners in county jail) with Smith v. County of San Mateo, 1999 U.S. Dist. LEXIS 13253 (N.D. Cal., Aug. 20, 1999) (sheriff acting as state official in capacity as jailer); Boakye-Yiadom v. City and County of San Francisco, 1999 U.S. Dist. LEXIS 12981 (N.D. Cal., Aug. 18, 1999) (sheriff is state official when providing court security); Hawkins v. Comparet-Cassani, 33 F.Supp.2d 1244 (C.D. Cal. 1999) (same).

28 Streit v. County of Los Angeles, supra, 01 C.D.O.S. 390. The court distinguished Peters, supra, 68 Cal.App.4th 1166, on the grounds that first, it was a state law decision that did not bind the Ninth Circuit and second, the detention in Peters was subject to a valid warrant, a subject of state law enforcement. The unlawful detentions in Streit, by contrast, were purely a function of bureaucratic inefficiency in the administration of the Los Angeles County jails. The court held that the functioning of the jails in that respect was not a matter of state law enforcement. Id. at 394-395.

29 Kimel, supra, 120 S.Ct. at 640. Katz v. The Regents of the University of California, 229 F.3d 831, 834 (9th Cir. 2000). "The States have consented, moreover, to some suits pursuant to the plan of the [Constitutional] Convention. . . . In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." Alden, supra, 527 U.S. at 755.

30 Katz, supra, 229 F.3d at 835.

31 Hill v. Blind Ind. & Services of Maryland, 179 F.3d 754, 760 (9th Cir. 1999), citing Wisconsin Dep't. of Corrections v. Schacht, 524 U.S. 381, 389 (1998).

32 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). E.g., Katz, supra, 229 F.3d at 834 (state did not assert immunity as a defense and general counsel submitted declaration specifically waiving immunity for purposes of the litigation).

33 Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946).

34 College Savings Bank, supra, 527 U.S. 666.

35 Parden v. Terminal R.Co. of Ala. Docks Dept., 377 U.S. 184 (1964).

36 College Savings Bank, supra, 527 U.S. at 680.

37 Id. at 683.

38 Schulman, supra, 01 C.D.O.S. at 386.

39 Id.
40 The Fourteenth Amendment provides in pertinent part:
"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .
"Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."
41 Seminole Tribe, supra, 517 U.S. at 59.
42 Oregon Shortline Railroad Co. v. Dept. of Revenue Oregon, 179 F.3d 1259, 1266 (9th Cir. 1998).
43 Kimel, supra, 120 S.Ct. at 648.
44 Florida Prepaid, supra, 527 U.S. at 639.
45 Kimel, supra, 120 S.Ct. at 644, quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (emphasis in original).
46 Florida Prepaid, supra, 527 U.S. at 643.
47 Id. at 642.
48 Id. at 647 quoting City of Boerne, supra, 521 U.S. at 532.
49 See Kimel, supra, 120 S.Ct. 631.
50 Id. at 640-641. This observation may have been intended to foreclose state immunity defenses to Title VII claims.
51 Id. at 646.
52 Id. at 646-647.
53 Id. at 647.
54 Id. at 648.
55 Id. at 649.
56 Id. at 650.
57 2001 U.S. Lexis 1700 (Feb. 21, 2001)
58 Id. at 17-22, citing Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).
59 Id. at 22.
60 Id. at 28. It remains to be seen, therefore, whether the legislative record is sufficiently well-developed to support abrogation of State sovereign immunity in a suit under either Title II or Title III.
61 Id. at 23-25.
62 Id. at 22.
63 Id. at 25.
64 Id. at 35-36 (Kennedy, J., concurring).
65 Id. at 32. Needless to say, the dissent, authored by Justice Breyer and joined by Justices Souter, Stevens and Ginsburg, vigorously disputed the majority's reading of the record and its emphasis on the degree of legislative evidence required to support congressional abrogation of state sovereign immunity under Section 5.
66 Green v. Mansour, supra, 474 U.S. at 68, citing Ex Parte Young, 209 U.S. 123 (1908).
67 Id. As the Court in Ex Parte Young explained, "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional." 209 U.S. at 159.
68 Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 269 (1997).
69 Sofamor Danek Group v. Brown, 124 F.3d 1179, 1184-1185 (9th Cir. 1997) citing Natural Resources Defense Council v. California Dept. of Transportation, 96 F.3d, 420, 422 (9th Cir. 1996).
70 Coeur d'Alene, supra, 521 U.S. at 282, 287.
71 Alden, supra, 517 U.S. at 76.
72 Id. Compare Sofamor Danek, supra, 124 F.3d at 1185 (finding that Congress intended to permit claims for injunctive relief under the Lanham Act against state officials) and Natural Resources Defense Council, supra, 96 F.3d at 424 (finding Congress intended to permit action for injunctive relief under Clean Water Act).

Public Library Internet Filters:

An Attack On Access To Freedom of Information

*by Phyllis W. Cheng, Esq.**

> *"These libraries have improved the general conversation of Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges."*
>
> *Benjamin Franklin*

Ever since Benjamin Franklin founded the nation's first subscription library system, public libraries have been a forum for upholding access to freedom of speech embodied under the First Amendment of the U.S. Constitution1 as well as article I, section 2, subdivision (a), of the California Constitution.[2] With the advent of the World Wide Web, library patrons are accessing the Internet through our public library system. Recently, public libraries have been under pressure to install filters or otherwise supervise Internet access for minors. This demand has resulted in the enactment of a controversial federal law requiring Internet filters for minors in public libraries receiving federal funds, as well as a California bill currently debated in the 2001-2002 legislative session. The purpose of this article is to assess the impact of these initiatives on access to the freedom of speech embodied in the federal and state constitutions.

Background

Existing California law provides for the establishment and funding of public libraries.[3] The Legislature has declared that the public library system's "diffusion [of information and knowledge] is a matter of general concern inasmuch as it is the duty of the state to provide encouragement to the voluntary lifelong learning of the people of this state."[4] The Legislature has further declared that "the public library is a supplement to the formal system of free public education, and a source of information and inspiration to persons of all ages, cultural backgrounds, and economic statuses, and a resource for continuing education and reeducation beyond the years of formal education . . . ."[5]

Education Code section 18030.5 provides that every public library receiving state funds and which provide public access to the Internet must adopt a policy regarding access by minors to the Internet by January 1, 2000.[6] However, the purpose of this statute is to limit electronic collection of Internet users' personal information in order to protect their privacy. [7] Similarly, Education Code section 51870.5 provides that a school district must adopt a policy for pupils' Internet access to harmful matters. However, this provision sunsets on December 31, 2002.[8]

Case Law

A California Court of Appeal decision recently held that a parent may not force a public library to censor Internet access for minors, citing federal preemption of state law claims under 47 U.S.C. § 230 ("section 230").[9] Section 230(c)(1) states that: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker or any information provided by another information content provider."

In 1997, the U.S. Supreme Court held unconstitutional two statutory provisions of the Federal Communications Decency Act[10] intended to protect minors from "indecent" and "patently offensive" communications on the Internet, because they abridge the fundamental right to receive information.[11] Likewise, in 1998, even as it suggested filtering as one possible alternative to an outright ban of Internet materials, one court noted that "filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks."[12] In Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, the court struck down a public library's Internet filtering system, holding that "[a]lthough [the library] is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access."[13]

Federal CHIPA Statute

In 2000, Congress enacted the Children's Internet Protection Act ("CHIPA").[14] Effective April 20, 2001, CHIPA requires public libraries receiving federal funds to install filtering software to block minors' access to obscene material on the Internet.

As of March 20, 2001, the constitutionality of CHIPA has been challenged in two federal suits on the grounds that the law violates the First Amendment's freedom of speech guarantee and the Fifth Amendment's Due Process Clause. In the first suit, American Library Assoc., Inc. v. United States ("ALA"),[15] the California Library Association is one of the 11 named plaintiffs, and People for the American Way Foundation is one of plaintiffs' counsel of record. In the second suit, Multnomah County Public Library v. United States ("Multnomah")[16], the Santa Cruz Public Library Joint Powers Authority is one of the 23 named plaintiffs, and the American Civil Liberties Union of New York is one of plaintiffs' counsel of record. On March 26, 2001, pursuant to 28 U.S.C. § 2284, the District Court convened a panel of three district court judges to hear and

determine the facial constitutional challenges to CHIPA in both lawsuits. The suits are expected to be on a fast track for review before this panel, and will certainly be appealed to the Third Circuit Court of Appeals and the U.S. Supreme Court.

California's AB 151

In the 2001-2002 legislative session, Assemblymember Sarah Reyes introduced AB 151. This bill would parallel CHIPA at the State level by requiring public libraries to install filtering software to limit Internet access to obscene matter, including obscene live conduct, on computers available to minors. Imposing a state-mandated local program, the bill would appropriate an unspecified sum from the General Fund to the State Librarian for allocation to public libraries to purchase and install such filtering devices.

This bill is supported by the Campaign for California Families, the Capitol Resource Institute, the Committee on Moral Concerns, Enough is Enough, Klaas Kids Foundation, and the National Center for Missing and Exploited Children. It is opposed by the American Civil Liberties Union, the California Library Association, Berkeley Public Library, and Alameda County Board of Supervisors.

Policy Implications for Enactment of AB 151

AB 151 presents serious constitutional implications for access to the freedom of speech in California's public library system. First, unintended consequences may result from the enactment of the bill. Consumer reports show that Internet filtering devices block as many unobjectionable as objectionable sites.[17] Terms such as "adult" and "Bambi" can trigger blocking devices.[18] Because of hate-promoting terms, hate-crime prevention Web sites such as the Simon Wiesenthal Center may also be blocked.[19] Some Internet filtering systems have blocked a government physics Web site with an address that began with "XXX," a Web site for Super Bowl XXX, the Web sites of Congressman Dick Army and Beaver College in Pennsylvania, sections of Edward Gibbon's Decline and Fall of the Roman Empire, and passages of Saint Augustine's Confessions.[20]

Second, consistent with Education Code section 18010, public libraries should not be put in the position of having to police the freedom of information to patrons of any age. To do so may create a chilling effect on the diffusion of information and knowledge in California's public library scheme, which encompasses179 library jurisdictions and 7,800 Internet work stations.[21]

Third, as a public policy matter, parents should have the sole right to determine the scope of their individual children's Internet access. There is and should be no substitute for parental supervision.

Fourth, AB 151's requirement for all libraries to filter obscene material from minors' Internet access may be interpreted as "a law which restrains or abridges liberty of speech" prohibited under California Constitution, article 1, section 2, subdivision (a). If enacted, the new law would certainly invite litigation.

Fifth, in a related matter, California's Court of Appeal decision in Kathleen R. has held that parents cannot force public libraries to use Internet filters for minors, because the matter is preempted under federal law. Hence, AB 151 may also face a preemption challenge.

Sixth, AB 151 is modeled upon its federal counterpart, CHIPA, which is being challenged as facially unconstitutional under the First Amendment in the ALA and Multnomah lawsuits (in which the California Library Association and the Santa Cruz Public Library Joint Powers Authority are named plaintiffs). Whatever the three-judge U.S. District Court panel decides, the two suits will likely be reviewed by the Third Circuit Court of Appeals and the U.S. Supreme Court. By extension, it is equally likely that this parallel California bill, if enacted, would face a similar challenge.

Conclusion

Though well intended, the recent slew of federal and state legislation requiring public libraries to install Internet filters for minors represents an assault on constitutional principles related to the freedom of speech. The failure to install filtering devices or their ineffectiveness in blocking objectionable material may subject local libraries to liabilities brought by either civil libertarians or library patrons. Even if such suits were unsuccessful, they still incur the time and expense incident to any litigation. Hopefully, these pressures will not chill public access to the freedom of information so essential to our public libraries.

Endnotes

1 "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I, cl. 2.
2 "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. art. I, §2, subd. (a).
3 Cal. Ed. Code, § 18010 et seq.
4 Cal. Ed. Code, § 18010.
5 Id., emphasis added.
6 Ed. Code, § 18030.5.
7 Sen. Rules Com., analysis of Sen. Bill No. 1386 (1998-99 Reg. Sess.) as amended Aug. 13, 1998, pp. 1-2.
8 Cal. Ed. Code, § 51870.5, subd. (b).
9 Kathleen R. v. City of Livermore __ Cal.App.4th__ [2001 Cal. App. LEXIS 158; 2001 Daily Journal DAR 2383] (Mar. 6, 2000).
10 47 U.S.C. § 223(a) and 47 U.S.C. § 223(d).
11 Reno v. ACLU (1997) 521 U.S. 844, 849, 874 ("Reno I").
12 Reno v. ACLU (E.D.Pa. 1999) 31 F.Supp.2d 473, 497 ("Reno II").
13 Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library 24 F. Supp. 2d 552, 570 (E.D.Va. 1998).
14 Pub.L. 106-554 (to be codified as 47 U.S.C. § 254(h) and 20 U.S.C. § 9134).
15 American Library Assoc., Inc. v. United States (E.D.Pa., Case No. 01-CV-1303) ("ALA").
16 Multnomah County Public Library v. United States (E.D. Pa., Case No. 01-CV-1322) ("Multnomah").
17 See Consumer Reports Online, Digital Chaperones for Kids, http://www.consumerreports.org/Special/ConsumerInterest/Reports/0103fil0.html.
18 Ibid.
19 Ibid.
20 ALA complaint, ¶ 38.
21 Assemb. Com. on Local Gov., analysis of Assemb. Bill No. 151 (2001-2002 Reg. Sess.) as amended Mar. 23, 2001, p. 1

* *Phyllis W. Cheng is a member of the Public Law Section's Executive Committee and Deputy Attorney General in the Civil Rights Enforcement Section, Office of the Attorney General, California Department of Justice, in Los Angeles. The statements and opinions in the article are those of Ms. Cheng and not necessarily those of the Attorney General or the California Department of Justice.*

The Public Law Section Programs and Events

The Public Law Section of the State Bar of California will be sponsoring the following programs and events at The State Bar Annual Meeting, September 6-9, 2001 at the Hilton Hotel in Anaheim:

Friday, September 7, 2001
2:15pm - 4:15pm — "Dealing With City Hall - Conflicts of Interest"

Saturday, September 8, 2001
11:00am - 12:00 noon — "Recent Developments in Affirmative Action Programs"

Saturday, September 8, 2001
2:15pm - 5:45pm — "Pitchess/Brady Motions"

Please join us on Friday, September 7 at 4:30p.m. for the "Public Lawyer of the Year" Reception: Honoree TBD

Registration Information will be mailed June 1, 2001.

A Message From The Chair

by Henry D. Nanjo, Esq.

As we come out of winter and into spring, California faces the challenges of the current "energy crisis" relating to California search for energy. The Public Law Section has a different kind of energy need. Due to some new schedules, new jobs and changes with some of the Executive Committee members; the Section may have some additional space for Executive Committee membership. If you are curious, interested or would like to have a hand in shaping the section in the future, please feel free to contact me at the e-mail address or telephone number at the end of this message to find out how you can participate! Also speaking of changes, my e-mail address has changed again, isn't technology grand?

In addition, we are moving forward with selecting the Public Lawyer of the Year. Please feel free to send me a note, if you know of a government lawyer who has exhibited years of dedication and outstanding efforts. Please send me a note, nominating the individual with a description of why you feel the person is deserving of the award.

The Public Law Section's current challenge is in meeting the needs of its varied members. When we think of the types, practice areas and employment of public lawyers, we cut across private firm/government lawyers lines, we comprise air districts, water districts and special districts of all types. The areas of law in which we practice are as varied as law itself. So the challenges are: Who are we? What are our Interests? How can the Public Law Section serve us?

The State Bar of California continues to evolve and the Public Law Section is streamlining its meetings, seeking cost savings measures to reduce administrative costs and to provide the best return for your section membership. Along these lines, I would like to try an experiment. If you could take a minute and e-mail me your response to the questions posed below, I would appreciate it. I will not share this information with any other entity and you will not get e-mails to your address unless you request it. This is just a straw poll to focus the Section in the future.

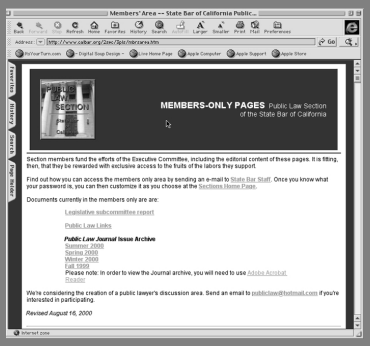
Q Are you in a private firm or government office?
Q In what areas of the law do you practice?
Q What Public Law topics are of interest to you?
Q Do you consider yourself in a small, medium or large office?
Q Would you be willing to contribute time or articles to the Public
Q Law Section, and what would you be willing to do?
(Optional, I had to try this.)
Q Any complaints or criticisms? Please try to make them positive.

Thanks! I will try to summarize the results in the next Public Law Journal.

In this issue of the Journal, one of our Executive Committee members, Martin Dodd has an article on the 11th Amendment. Our section has had several educational seminars related to this topic at the Annual Meeting. This is an interesting issue which keeps many of us, on our toes. The issue of the California Public Records act and its relationship with the Fair Credit Reporting Act is the subject of the article by Janel Ablon. In addition, Marjorie Cox writes an article on another topical issue, the recent California Supreme Court holding in Hi-Voltage Wire-Works, Inc. v. City of San Jose, which found outreach to minority contracting to be unconstitutional. Further, Phyllis Cheng writes an article on public library Internet filtering and the assault on access to the freedom of speech. We are always seeking submissions of interest to Public Lawyers, please feel free to contact either myself or Phyllis Cheng.

Remember; please send my your straw poll answers and feel free to contact me any time either by telephone at (916) 874-5567 or by my new e-mail at hnanjo@saccounty.net. Hope to hear from you soon!

MEMBERS ONLY WEB PAGE ACCESS



- Updated reports of the Public Law Section's Legislative Subcommittee on pending state legislation.
- Public Law Journal Archives.
- Public Law Internet Links.
- Notes of developments of interest to section members.

To access these pages, point your browser to www.calbar.org/publiclaw and click on the link to the Members Area. When you are asked for your password, use your State Bar number as both your user ID and your password.

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